No. 95-1184

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
Petitioner,
v.
WILEMAN BROS. & ELLIOTT, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.3(b) of this Court's Rules, the American Federation of Labor and Congress of Industrial Organization ("AFI-CIO") hereby moves for leave to file a brief *amicus curiae* in the above styled case in support of petitioner. Counsel for petitioner has consented to the filing of said brief, counsel for respondents has not replied to either telephonic or FAXed requests for consent.

INTEREST OF THE *AMICUS CURIAE*

The AFL-CIO is a federation of 75 national and international labor organizations having a total membership

of approximately 13,000,000 working men and women. This case raises a "negative" First Amendment challenge by fruit handlers covered by a government program of market regulation that, *inter alia*, provides for the mandatory payment by the handlers of fees that pay the cost of generic advertisements of the fruits they handle. This case is thus a variation on the line of cases challenging on the same negative First Amendment theory the agency shop fee required under collective bargaining agreements entered into pursuant to the Railway Labor Act and the National Labor Relations Act. Indeed, both the *certiorari* petition and the brief in opposition in this case contain extensive discussions of these authorities.

The AFL-CIO has actively participated in the agency shop cases and seeks to participate in this case to state its views on their meaning and on the proper application of their jurisprudence.

CONCLUSION

For the above stated reasons this motion for leave to file an *amicus curiae* brief in support of petitioner should be granted.

Respectfully submitted,

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") files this brief *amicus curiae* contingent on the granting of the attached motion for leave to file said brief. The AFL-CIO's interest in this matter is set out in that motion.

STATEMENT OF THE CASE

The court of appeals in the decision below invalidated on constitutional grounds certain aspects of the California peach, nectarine and plum marketing orders issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act ("AMAA").

The purpose of the AMAA is to "establish and maintain . . . orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. § 602(1). In furtherance of this purpose, the Secretary is authorized to issue marketing orders regulating, among other things, the quality of the covered commodity and the quantity that may be shipped to market. 58 F.3d at 1372. A series of amendments to the Act expressly provide that marketing orders for nectarines, peaches and plums may authorize "paid advertising." 7 U.S.C. § 608(c)(6)(I). *See* 68 Stat. 906 (1954) (authorizing marketing and development projects); 76 Stat. 632 (1962) (authorizing paid advertising of cherries); 79 Stat. 1270 (1965) (extending paid advertising authorization to California plums and nectarines); 85 Stat. 340 (extending paid advertising authorization to California peaches). Marketing orders are subject to the notice and comment requirements of the Administrative Procedure Act. *Id.* And, before being adopted by the Secretary, the order must be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the covered commodity. *Id.*

Marketing orders are implemented by committees, whose members are selected by the Secretary from among the covered businesses. 58 F.3d at 1372. The committee recommends rules and regulations to the Secretary covering such matters as grading, product development and generic product promotion. *Id.* The proposed rules and regulations become effective when adopted by the Secretary through informal rulemaking, and are subject to modification at any time on the Secretary's initiative or the request of a covered handler for reconsideration. *Id.* at 1372-73.

The expense of administering a marketing order is covered by an assessment imposed on the covered commercial fruit packers and distributors ("handlers") based on the volume of their shipments. 58 F.3d at 1372. The

handlers' assessments cover administration, inspection services, research, advertising and promotion. *Id.* at 1373. The total amount of the assessments is based on an annual budget submitted by the committee and approved by the Secretary. *Id.*

The handler-plaintiffs in this case challenged the peach, nectarine and plum marketing orders on a variety of grounds, most of which were rejected by the courts below. The court of appeals did, however, sustain the handlers' First Amendment challenge to being required to provide financial support for generic advertising campaigns promoting the consumption of these fruits.

The court of appeals began its analysis of the handlers' First Amendment claim by recognizing that the government has a substantial interest in promoting the sales of these fruits. 58 F.3d at 1378. And, the court below also recognized that this interest is "undoubtedly" furthered by the generic advertising campaign since "advertising increases consumption of the product being advertised." *Id.*

The court of appeals held, however, that furthering a substantial government interest is not sufficient to sustain compulsory financial support of product advertising against a First Amendment challenge. To defend this aspect of the marketing order, the court below ruled, the Secretary must prove that "the generic advertising program sells the product more effectively than the 'specific, targeted marketing efforts of individual handlers.'" 58 F.3d at 1378. Having found that the Secretary failed to prove that the government's interest could not have as effectively been carried out by encouraging the handlers to engage in individual advertising, the court below struck down the compulsory financing of generic product advertising as violative of the First Amendment.

SUMMARY OF ARGUMENT

The respondent fruit handlers—who are covered by a general orderly marketing program—claim a negative First Amendment right to abstain from making their required proportionate contribution to the costs of generic advertisements promoting the consumption of the fruits they market. Because advertising is commercial speech, the court of appeals concluded that the fruit handlers' negative First Amendment claim is governed by *Central Hudson Gas & Electric Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980). The court of appeals erred in concluding that the strict standards enunciated in *Central Hudson* for determining the constitutionality of *prohibitions* against truthful commercial advertising apply to a regulatory scheme that *promotes* such advertising. The First Amendment protects commercial speech in the interest of furthering the free flow of information. This same value, which is infringed upon by a complete ban of truthful advertising, is advanced by requiring the fruit handlers to financially support truthful generic advertising.

Instead, the fruit handler's claims are like other claims this Court has considered by members of regulated groups urging that their compelled association with expressive activity contemplated by a legislative regulatory scheme violates their constitutional right of non-association. Most closely analogous are claims of this nature that have been brought by employees challenging union expenditures in agency shop cases, and attorneys challenging bar expenditures in unified bar cases.

In these cases the Court has repeatedly rejected these claims so long as the positive group speech activity is contemplated by the regulatory scheme and there is a rational basis for concluding that this positive speech activity serves the overall goals of the regulatory scheme. And, unless the challenged speech activity is political or ideological speech at the core of protected First Amendment

values, the Court has taken a generous view in considering whether the expenditures are rationally related to the overall legislative purpose.

These results are explained by the fact that an asserted right not to be compelled to speak contracts the range of communication which it is the primary purpose of the First Amendment to protect. That being so, the Court has been careful to limit the reach of the negative speech doctrine, particularly in the context of economic and social regulation, to assure that the doctrine serves its constitutional function—to protect claims of conscience and the autonomy of the individual—without trenching on the government's general authority to regulate commerce or on the positive First Amendment right of free speech.

Because none of the interests protected by the negative speech doctrine are implicated by the fruit handlers' claims here, and because a claim that a regulated party has a broad constitutional right to opt out of the affirmative portion of an overall system for regulating a facet of the economy threatens as well important economic and social programs, the decision below should be reversed.

ARGUMENT

1. In this case the Court is being asked by business entities covered by a government marketing regulation program to endorse a negative First Amendment right to opt out of the required funding of part of that program. The respondent fruit handlers object to the aspect of the program that requires them to pay for generic advertising of the fruit they handle. Because advertsing is a form of speech, the handlers claim that their desire not to fund the ads rises to the level of a First Amendment right not to be compelled to speak. And, because advertising is a form of *commercial* speech, the handlers assert that their First Amendment claim should be resolved by application of this Court's *Central Hudson* test, and that the required funding of ads fails that test.

As we now show, this argument—adopted by the court of appeals—is wrong in each of its particulars as well as in its conclusion.

The "negative" First Amendment right the handlers invoke in this commercial context is not comparable in substance or in force to the "positive" First Amendment right to truthfully advertise evaluated in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980), and its progeny. The court of appeals' supposition that in the commercial context every positive First Amendment speech right generates an equal and opposite negative First Amendment speech right has no basis in reason or law.

Instead, the handlers' claims are similar to claims that have been made by members of other regulated groups who assert a First Amendment right to opt out of commonly funded group activities authorized by the regulatory statute in question. These attenuated First Amendment claims have been uniformly rejected by this Court on a showing that the challenged activity is (a) contemplated by and (b) rationally related to the governmental

purposes of the underlying regulatory program. Precisely because the claim here is of the same kind as those claims, it should be rejected for the same reasons on the same showing.

2. At the outset, we think it plain that in mechanically reaching the conclusion that the *Central Hudson* analysis applies to every form of regulation touching upon commercial speech, the court below committed the error—identified by this Court—of "concluding that *all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression." *44 Liquormart, Inc. v. Rhode Island*, —— U.S. ——, 116 S. Ct. 1495, 1507 (1996) (emphasis in original).

The *44 Liquormart* Court pointed out that *Central Hudson* "identified the serious First Amendment concerns that attend blanket advertising prohibitions that do not protect consumers from commercial harms," and that *Central Hudson* held that such complete bans on truthful advertising must be reviewed with "special care." 116 S. Ct. at 1508, quoting *Central Hudson*, 447 U.S. at 566 n.9. And, *44 Liquormart* adds that "speech prohibitions of this type rarely survive constitutional review" under the *Central Hudson* standards. 116 S. Ct. at 1508.

Central Hudson's heightened standard of review is not a mere happenstance but rather a legal standard deeply rooted in substantive First Amendment concerns. First of all, "complete speech bans . . . are particularly dangerous because they all but foreclose alternative means of disseminating certain information." *44 Liquormart*, 116 S. Ct. at 1507. And, "special concerns arise from 'regulations that entirely supress commercial speech in order to pursue a nonspeech-related policy,'" because "[i]n those circumstances, 'a ban on speech could screen from public view the underlying governmental policy.'" *Id.* at 1506-07, quoting *Central Hudson*, 447 U.S. at 566

n.9. Thus, "commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy." *44 Liquormart*, 116 S. Ct. at 1508, citing *Central Hudson*, 447 U.S. at 575 (Blackmun, J., concurring).

Equally to the point, the justifications normally advanced for applying a more relaxed standard of review to the regulation of commercial speech do not apply to a complete ban on truthful advertising. As a general matter, "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false commercial advertisements from true ones, and . . . the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation." *44 Liquormart*, 116 S. Ct. at 1506 (citations omitted). By contrast,

> Regulations that suppress the truth are no less troubling because they target objectively verifiable information, nor are they less effective because they aim at durable messages. As a result, neither the "greater objectivity" nor the "greater hardiness" of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference. [*44 Liquormart*, 116 S. Ct. at 1508.]

None of the concerns animating and explaining the *Central Hudson* rule are even remotely implicated in the requirement that the fruit handlers covered by a marketing order financially support the generic product advertising aspect of that program. To the contrary, the generic advertising component of the marketing orders *furthers* "the disclosure of beneficial consumer information." *44 Liquormart*, 116 S. Ct. at 1507. *See Central Hudson*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").

Where "the purpose of [the challenged] regulation is consistent with the reasons for according constitutional

protection to commercial speech" that purpose "justifies *less than strict review*." *44 Liquormart*, 116 S. Ct. at 1507 (emphasis supplied). The court of appeals committed fatal error in proceeding from the opposite premise.

3. (a) Our showing that *Central Hudson* does not control here suffices to clear away an obstacle to the proper evaluation of the handlers' negative First Amendment claim, but does not suffice to show what that proper evaluation entails. It is helpful in starting on the latter task to outline the challenged regulation and the nature of respondents' challenge to that regulation.

The Agricultural Marketing Agreement Act regulates what would otherwise be an unrestricted market in the covered agricultural products to assure "orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. § 602(1). As part of that overall program for rationalizing the production and sale of these commodities, the covered producers are required to financially support regulatory programs that encourage the consumption of the covered commodity, including generic advertising. *See*, pp. 2-3, *supra*.

The court of appeals found that the required funding of the ads here violated the fruit handlers' First Amendment rights because the handlers "disagree[d]" with the messages of two of the ads, because the ads allegedly helped the handlers' competitors more than the ads helped them, and because the handlers believed that "they can better spend their marketing money on their own" ads. 58 F.3d at 1377.

(b) This is not the first occasion this Court has considered like claims. In a wide variety of settings, the legislature has regulated the terms of commercial and professional interactions and compelled the regulated parties to act in certain ways. Time and again the Court has thereupon been asked to consider claims by the regulated actors that the government compulsion violates a nega-

tive First Amendment right *not* to associate or *not* to speak.

Thus, property owners who hold their property open to the public have claimed that a law requiring them to allow speakers of all viewpoints to speak on their premises violates their right not to be compelled to speak. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Lawyers required to disclose certain information in their advertising have challenged the requirement on similar negative speech grounds. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). By the same token, cable television companies have challenged the law requiring them to carry the signals of local broadcast television stations as a violation of the cable companies' right not to speak. *Turner Broadcasting System, Inc. v. F.C.C.*, —— U.S. ——, 114 S. Ct. 2445 (1994). And, employees required to associate as a result of a governmentally-sanctioned bargaining system that mandates the selection of an exclusive bargaining representative have claimed that the compelled funding of the representative violates their right of non-association. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Finally, claims like these employee claims have been made by members of unified state bar associations challenging the compelled payment of bar dues. *Keller v. State Bar of California*, 496 U.S. 1 (1990).

In each of these settings, members of the regulated group have urged that their compelled association with some expressive activity offends them, and that they have a negative First Amendment right to opt out of participation in that speech activity. In each of these settings, too, the Court has rejected these claims, so long as the positive group speech activity is contemplated by the regulatory scheme and there is a rational basis for concluding that the positive speech activity serves the overall goals of that regulatory scheme.

(c) The long line of agency-shop/unified-bar fee cases present the closest analogy to this marketing order case.[1]

In both the union/agency-shop and the state-unified-bar fee contexts, the government has "compelled financial support of group activities," *Lathrop*, 367 U.S. at 820, notwithstanding any objection a covered individual might have to such compelled association. In these settings, as here, the legislature has allowed the association to levy on members of the common class—employees in a collective bargaining unit, individuals licensed by the state to practice law—to fund the association's activities. And, in these settings, as here, the legislation is a response to perceived economic or social problems in the unregulated system for providing goods or services.

Hanson, supra, which arose out of the Railway Labor Act, is the fountainhead of this jurisprudence.[2] And, *Hanson*'s central holding is that, so long as the required financial support is for group activity germane to the economic or social goals that the legislature sought to advance, the assertion of a negative First Amendment right not to financially associate with the group is without substance. 351 U.S. at 236- 238. Indeed, *Hanson* recognizes that

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[1] *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Machinists v. Street*, 367 U.S. 740 (1961); *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956).

[2] As indicated above, the Railway Labor Act, in relevant part, allows a union chosen to be the exclusive bargaining representative by the majority of employees in a bargaining unit to negotiate an "agency shop" contractual provision with the employer requiring all members of the bargaining unit to pay a uniform fee to the union to cover the union's costs in acting as an exclusive representative.

given the legislative judgment that such group activity is an integral part of an overall social or economic program and that required financial support is necessary to prevent "free riding" by those whose interests the group activity is designed to advance, such a First Amendment challenge is, in its essence, the kind of challenge to the government's broad power to regulate commerce that the Court has historically denied. *Id.* at 238 ("the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments").

The *Hanson* Court thus rejected the employees' negative First Amendment argument on the ground that "[i]ndustrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained." 351 U.S. at 233. The agency shop law therefore passed constitutional muster because the Congress had the authority to reach the conclusion that the agency shop would promote peaceful labor relations. *Id.* at 235. In the *Hanson* Court's view, the only First Amendment problems that could arise as a result of the operation of the agency shop would be if the money collected was spent on activities that both impinge on First Amendment values and are "for purposes *not* germane to collective bargaining." *Id.* at 235 (emphasis supplied). *See also Street*, 367 U.S. at 768; *Allen*, 373 U.S. at 121; *Ellis*, 466 U.S. at 448.

Abood, the seminal case on public sector collective bargaining, is to the same effect. The Court noted that the compelled funding of a group which takes positions with which one disagrees "might well be thought . . . to interfere in some way with an employee's freedom to associate . . . or to refrain from doing so as he sees fit." 431 U.S. at 222. The Court rejected the negative First Amendment challenge to such compelled association on

the ground that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations. . . ." *Id.*

In so ruling, the *Abood* Court emphasized that when the union is engaged in the collective bargaining function that is at the heart of the government's labor-management relations scheme, its actions are not subject to a valid negative First Amendment challenge regardless of how controversial those actions may be. The Court, for example, observed that the union's attempt to negotiate funding for abortion as part of the employees' medical plan might well offend a fee payor's conscience. But taking and forwarding that bargaining position does not generate any opt-out right. 431 U.S. at 222. "As long as [the union's leaders] act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 223.

The Court reached the same conclusion on the same doctrinal basis in the state unified bar cases. *Lathrop* holds that the "compelled financial support of group activities," 367 U.S. at 820, withstands constitutional challenge so long as the legislature "might reasonably believe" that such support serves "a legitimate end of state policy," *id.* at 842 & 843. And *Keller* reaffirms this point as one so clear as to be almost beyond discussion: "It is entirely appropriate that all of the lawyers who derive a benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in [a self-regulation] effort." 496 U.S. at 12.

Looked at in a wider perspective, the union agency shop and state unified bar fee cases are consistent with, and an integral part of, a larger category of cases—those in which the Court "has recognized the strong governmental interest in certain forms of economic regulation, even though

such regulation may have an incidental effect on rights of speech and association." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982). For the Court in accepting in differing contexts the view that protected expression can take many different forms—and is not limited to political speech—has well understood that taken to an extreme, assertions of the negative rights of non-expression and non-association threaten even the most unexceptional rules of law.

That being so, once it has identified a legitimate *non-expressive* governmental purpose, the Court has refused to allow speech claims based solely on the regulation's "incidental effect" on the regulated party to trump that governmental purpose. As the *Claiborne Hardware* Court put it:

> The right of business entities to "associate" to suppress competition may be curtailed. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees and consumers to remain free from coerced participation in industrial strife." [458 U.S. at 912 (citations omitted).]

See also FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426 (1990) (no First Amendment protection where "the undenied objective of the[] boycott [i]s an economic advantage for those who agreed to participate").

(d) To say that the government has a broad power consistent with the First Amendment to compel association as part of the governance of the day-to-day social and economic affairs of the society is not to say there are no First Amendment limits to the government's regulatory powers. While the government is free to have and to express its point of view, nevertheless "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books." *Board of Education v. Pico*, 457 U.S. 853, 870-871 (1982); *see also id.* at 907 (Rehnquist, J., dissenting) ("I can cheerfully concede . . . this . . . extreme example[]").

Analogous limits apply when the government compels financial support of group activities. The Court first identified those constitutional limits in *Abood*. Contrary to what one would suppose from a reading of respondents' papers, *Abood* does *not* hold that each expenditure made by an entity through the use of exacted fees is subject to a separate, strict scrutiny First Amendment analysis, any more than the Court has ever held that "a local school board . . . need[s] to demonstrate a compelling state interest every time it spends taxpayer's money in ways the taxpayer finds abhorrent." *Abood*, 431 U.S. at 259, n.13. Rather, *Abood* and its progeny demand proof that the challenged speech activity is contemplated by and rationally related to the overall regulatory regime that caused the government to compel the association in the first instance.

The Court has iterated these "germaneness" and "rational basis" requirements in this context in a variety of formulations. Thus, in Hanson, in the course of finding no constitutional violation in the collection of an agency fee, the Court also indicated that "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." 351 U.S. at 235. And, in *Abood* the Court quoted the above language from *Hanson* and added further that "[a]s long as [union leaders] act to promote the cause which justified bringing the group together, the individual cannot withdraw his support because he disagrees with the group's strategy." 431 U.S. at 223. By the same token, in *Keller*, reviewing challenges to expenditures of a state unified bar, the Court held that "[t]he State Bar may

therefore constitutionally fund activities germane to [the State's interest in regulating the legal profession] . . . It may not, however, in such a manner fund activities of an ideological nature which fall outside those areas of activity." 496 U.S. 14. *See also id* ("the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession").

And, in each of these cases, the Court also made it plain, albeit once again through a variety of locutions, that for the objector to make out a negative First Amendment claim he must also demonstrate that the complained-of compulsion is something over and above—something qualitatively different than—the compulsion inherent in the government's decision to require group association in the first instance. Thus, for example, as *Lehnert* explains, the Court in the Railway Labor Act agency-shop cases "limited its inquiry to whether the expenses at issue 'involve[d] *additional* interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest.'" *Lehnert*, 500 U.S. at 518, quoting *Ellis*, 466 U.S. at 456.

Reviewing these varying formulations, the *Lehnert* Court concluded that objectors may be compelled to contribute to the funding of a group activity so long as the activity is determined to

> (1) be "germane" to [the entity's statutory mission]; (2) be justified by the government's vital policy interest . . . and [by the interest in] avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of [the compelled funding scheme]. [*Lehnert*, 500 U.S. at 519; *see also Keller*, 496 U.S. at 13-15.]

(e) The Court, moreover, following the general approach to construing regulatory statutes, has taken a

generous view in considering whether the challenged group expenditures are within the legislature's contemplation, and in considering whether those expenditures are rationally related to the legislature's regulatory purposes.

In *Ellis*, the Court gave short shrift, for example, to challenges to union social activities on the ground that the Congress was not "inclined to scrutinize the minor incidental expenses incurred by the union in running its operations." 466 U.S. at 450. While acknowledging that the objectors made out a negative First Amendment claim in form, the Court found the claim to be without substance.

> [W]e perceive little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself. . . . The very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds. "The furtherance of the common cause leaves some leeway for the leadership of the group." [*Id. at* 456-457 (citation omitted)].

And, in *Lehnert*, the Court rejected the objector's claim that there has to be some "direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit," finding that requiring "so close a connection" would be inconsistent with the constitutional test. 500 U.S. at 522-523.

On the other hand, where the challenged activity trenches on core First Amendment values, the Court has demanded a closer fit. In particular, in both the agency shop and the unified bar contexts, the Court has struck down compelled funding of expenditures for the group's political or ideological activity, where it was not clearly established that these activities form a necessary part of the group's governmentally-sanctioned purpose. As such, the test insures that the group is not using the free rider rationale

"as a cover for forcing ideological conformity." *Hanson*, 351 U.S. at 238.

See, e.g., Abood, 431 U.S. at 220 (striking down compelled funding "for political and ideological purposes unrelated to collective bargaining," because such funding compelled employees "to associate for the purpose of advancing [political] beliefs and ideas"); *id.* at 235-236 (if the group is to "spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties [under the statutory scheme], . . . such expenditures [must] be financed from charges, dues, or assessments paid by [those] who do not object to advancing those ideas and who are not coerced into doing so against their will"); *Keller*, 496 U.S. at 13-14 (because "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services[,] [t]he State Bar may . . . constitutionally fund activities germane to those goals out of the mandatory dues of all members[,] [but] [i]t may not . . . in such manner fund activities of an ideological nature which fall outside of those areas of activity."); *id.* at 15 ("those activities having political or ideological coloration which are not reasonably related to the advancement of such goals").

4. The agency shop and unified bar cases' negative First Amendment rights rulings follow logically from general free speech and free association principles.

(a) The two recognized purposes of the First Amendment are: (1) " 'to secure the widest possible dissemination of information from diverse and antagonistic sources' [so as] 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people' " (*New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)); and (2) to assure "[t]he individual's interest in self-expression" (*First National Bank v. Bellotti*, 435 U.S. 765, 777 n.12 (1978)).

A right to communicate free of government *limitations* advances both of these purposes. In contrast, a supposed "right" *not* to communicate at all in the context provided by government economic and social regulation, such as the marketing legislation here, is divorced from—and in tension with—the "marketplace of ideas" purpose of the First Amendment. An economic actor who refuses to associate with others for the purposes of funding communications germane to that program is quite obviously not enhancing—but rather contracting—the range of communication which it is a primary purpose of the First Amendment to promote. An expansive negative First Amendment rights approach, rather than buttressing positive First Amendment rights, cuts into those rights.

(b) It is, therefore, not surprising that the other set of First Amendment values, concerning the preservation of individual integrity, has been the focus of the negative First Amendment rights cases, and must provide the set of values that the fruit handlers rely upon here. In *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), the Court defined the area of protection as "the sphere of intellect and spirit which it is the purpose of First Amendment to preserve from all official control"; and in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), the Court characterized the protected interest at stake as "the broader concept of 'individual freedom of mind'." *See also Abood*, 431 U.S. at 234-235; *compare Elrod v. Burns*, 427 U.S. 347, 356-357 (1976).

These are hardly self-defining phrases, but the evolving case law beginning with *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), gives them content. That case raised a compelled speech challenge to a law requiring attorney advertising to contain a notice stating that clients who retain lawyers on a contingent fee basis are required to pay costs. The Court began its analysis by rejecting out-of-hand Zauderer's attempt to bring his claim within *Wooley* and *Barnette*:

> [T]he interests at stake in this case are not of the same order as those discussed in *Wooley*, [*Miami Herald Publishing Co. v.*] *Tornillo*, [418 U.S. 241 (1974),] and *Barnette*. . . . Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [D]isclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech. [471 U.S. at 651 (emphasis in original).]

In light of the minimal First Amendment interest involved, the Court "h[e]ld that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 626. In stating this conclusion, moreover, the Court

> reject[ed Zauderer's] contention that we should subject disclosure requirements to a strict "least restrictive means" analysis. . . . *See, e.g., Central Hudson*[]. Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purpose can be hypothesized. [*Id.* at 652, n.14.]

The *Zauderer* approach is not limited to negative commercial speech claims, but applies more generally to the range of situations in which the claim of a right not to speak bows to a compelled association that is a necessary feature of a broader regulatory program. Thus, in *PruneYard*, the Court, in rejecting the shopping center's negative First Amendment attack on California's law permitting the use of open commercial property for a broad

array of speech activity, noted that "*Wooley* . . . was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used 'as part of his daily life,' and refused to permit him to take any measures to cover up the motto even though the Court found that the display of the motto served no important state interest." 447 U.S. at 87. And, the *PruneYard* Court characterized *Barnette* as a case that "involved the compelled recitation of a message containing an affirmation of belief." 447 U.S. at 88. *See also Board of Education v. Pico*, 457 U.S. at 864 (plurality opinion); *id.*, at 876 (Blackmun, J., concurring); *id.* at 889 (Burger, C.J., dissenting); *id.* at 896-97 Powell, J., dissenting); *id.* at 909, 915 (Rehnquist, J., dissenting).

In the *Hanson* line of cases, in *PruneYard*, and in *Zauderer*, of course, the claimant is *not* closely and personally involved in communicating the message, is *not* likely to be identified with the message, *can* expressly disavow the message, and *is* free to communicate his or her own message on the same subject. Where all this is true the Court has recognized that the government's regulatory program cannot be said to work a meaningful incursion on the objector's intimate, personal rights of conscience protected by *Barnette* and *Wooley*.

Indeed, to ascribe to the business entities here, to the lawyer in *Zauderer*, or to the shopping center in *PruneYard*, each acting in a wholly commercial context, an "intellect," a "spirit," or a "mind," is to confuse metaphor with reality. Business enterprises do, to be sure, enjoy the First Amendment's protection against government censorship. *Bellotti, supra.* But the *Bellotti* Court declined the invitation to hold that "corporations have the full measure of rights that individuals enjoy under the First Amendment." 435 U.S. at 779, n.14. Rather, the Court there recognized that

"Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against self-incrimination . . . or . . . the enjoyment of the right to privacy." *Id.* And, as the various opinions in *Bellotti* discuss at some length, a business corporation's First Amendment rights derive from "the inherent worth of the [corporation's] speech in terms of its capacity for information," *id.* at 777, and *not* from "[t]he individual's interest in self-expression . . . a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge," *id.* at 777 n.12.

The sum of the foregoing is thus: in a setting involving government regulation of commercial or professional activity the Court has refused to extend the right not to associate to the point at which it prohibits the government from requiring regulated parties to fund activities—including expressive activities—that further the regulation's overall economic and social purposes.[3]

(c) That statement of the law, we believe, takes full cognizance of *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), where the Court invalidated a right-of-reply statute that required any newspaper that assailed a political candidate's character to print the candidate's reply in equal space and prominence. As the Court explained in *Turner Broadcasting System, Inc. v. F.C.C.*, —— U.S. ——, 114 S. Ct. 2445 (1994)—even apart from whatever distinctions exist between media corporations and other types of businesses—*Tornillo* does *not* rest on the newspaper's asserted negative right of non-speech, but on the newspaper's *positive right to speak* and on the need to assure that government regulation does not penalize or otherwise chill that right:

[3] Indeed, for the reasons stated above, the Court has never accepted the proposition that business entities have any purely negative speech rights at all.

> Because the right of access at issue in *Tornillo* was triggered only when a newspaper elected to print matter critical of political candidates, it "exact[ed] a penalty on the basis of content," . . . [and] would deter newspapers from speaking in unfavorable terms about political candidates. . . . Moreover, . . . the law induced the newspaper to respond to the candidates' replies when it might have preferred to remain silent. [*Turner Broadcasting,* 114 S. Ct. at 2465 (quoting *Tornillo,* 418 U.S. at 275).]

And, the access regulations at issue in *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1 (1986), were struck down for similar reasons. Once again the Court refused to accept the proposition that business entities have any negative right of non-speech. Instead, the Court determined that a law requiring a state utility to distribute an editorial newsletter published by a consumer group critical of the utility's rate-making practices would require the utility "to respond to arguments and allegations made by the [group] in its messages to [the utility's] customers." *Id.* at 16. It was that governmentally-dictated "forced response" that the Court concluded was "antithetical to the free discussion the First Amendment seeks to foster." *Id.*

Indeed, *Turner Broadcasting, supra,* in addition to explaining the theory and the limits of *Tornillo,* underlines those limits in its holding that cable operators have no First Amendment right to decline to "transmit speech not of their own choosing." 114 S. Ct. at 2646.

The *Turner Broadcasting* Court explained that the "must-carry" provisions at issue in that case "are not activated by any particular message spoken by cable operators and thus exact no . . . penalty," are not designed in any way to "counterbalance the message of the cable operators," and do not "force cable operators to alter their own messages to respond to the broadcast program-

ming they are required to carry." 114 S. Ct. at 2465. Moreover, like the lawful compelled access at issue in *PruneYard, supra,* the compelled message "would 'not likely be identified with those of the owner.' " 114 S. Ct. at 2466, quoting *PruneYard,* 447 U.S. at 87. Finally, "no aspect of the must-carry provisions would cause a cable operator . . . to conclude that 'the safe course is to avoid controversy.' " 114 S. Ct. at 2466, quoting *Tornillo,* 418 U.S. at 257.

Turner Broadcasting, then, is at one with the *Hanson* line of cases, and with *Zauderer* and *PruneYard.* As the *Turner Broadcasting* Court emphasized in the strongest terms, a regulated business' claim of a constitutional right not to speak is, at its core, inconsistent with the paramount purposes of the First Amendment:

> The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict . . . the free flow of information and ideas. [114 S. Ct. at 2466.]

5. The court of appeals here, applying *Central Hudson,* struck down the required funding of generic product advertising on the hypothesis that a "more narrowly tailored" opt-out regime is "an obvious alternative to the mandatory collectively-financed advertising program." 58 F.3d at 1380. No plausible reading of the relevant First Amendment case law, and no plausible understanding of the principles that animate that case law, support that approach. What the Court said in dismissing a virtually identical argument in *Zauderer* is fully applicable here:

> Because the First Amendment interests implicated by [the negative speech claim] are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purpose can be hypothesized. [471 U.S. at 652, n.14.]

Turning from the court of appeals' doctrinal rationale to the fruit handlers' specific complaints to funding generic product advertisements, it is not disputed that the generic ads are "germane" to the government's regulation of this market, and it is not disputed that the generic ads are rationally related to the overall purposes of the program. That being so, claims that regulated parties "disagree" with the message of the ads, 58 F.3d at 1377, or that "they can better spend their marketing money on their own" ads, *id.,* simply do not rise to the level of a cognizable First Amendment claim.

It is very much to the point in that regard that the handlers' claims raise do *not* any of the political or ideological concerns that led the Court in the union agency shop and state unified bar cases to closely scrutinize claims that compelled partisan political expenditures were part of the legislative design under review. To compare the objector's claims of consicence in those cases—or the claims of conscience of the citizens in *Barnette* and *Wooley*—to a fruit handler's claim here that he found one of the ads in question contained "subliminal sexual messages," 58 F.3d at 1377, n.6, is to trivialize the "right of conscience" as defined by this Court and to do so in a way that threatens important economic and social programs as well as positive speech values.

Implicitly acknowledging the weakness of their negative speech claim, the fruit handlers assert that their "ability to engage in protected commercial speech is severely diminished" by the marketing orders, "due to the restrictions placed on respondents' budgets by being forced to contribute to the 'generic' message." Opp. to Pet. 12 & 13. But this objection proves far too much. The claim that a government-mandated financial obligation diminishes the regulated class' resources, and hence its financial capacity to speak, applies to any and all government required expenditures, and has nothing whatsoever to do with the nature of the required expenditure.

Rejecting the same argument in the agency shop context, the Ninth Circuit itself observed that "we seriously doubt that this states a First Amendment injury at all. . . . Any other conclusion would turn every tax refund suit—indeed every monetary claim against an entity acting under color of law—into a First Amendment case." *Grunwald v. San Bernardino School Dist.*, 994 F.2d 1370, 1374-1375 (9th Cir.), *cert. denied*, 114 S. Ct. 439 (1973). Money that the growers pay to support the regulatory aspects of the marketing orders is also unavailable for the growers' own advertising, but they do not pretend that this "infringement" on their ability to engage in advertising makes out a First Amendment claim. The growers' promotion of their own sales, "inspired as it is by the profit motive," is undoubtedly hardy enough to survive whatever "chilling effect" results from being required to financially support the part of the overall orderly marketing program that promotes the sale of nectarines, peaches and plums generally. *44 Liquormart*, 116 S. Ct. at 1506. While *Buckley v. Valeo*, 424 U.S. 1 (1976), teaches that money can at times be speech, it remains the case that money can also be just money, and that its collection can be devoid of First Amendment difficulties.[4]

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[4] It is, of course, true that an individual may object to the fact that through association, ideas with which the individual disagrees ultimately might be magnified in volume and importance. But at least where, as here, the individual remains entirely free to add his own voice to the dialogue, and to associate with others to do so, that objection rings hollow. Indeed, in *Regan v. Taxpayers Without Representation*, 461 U.S. 540 (1983), this Court necessarily rejected the notion that when the government grants a limited, solely financial advantage to one type of speech activity, that grant constitutes such a fundamental distortion of the balance of the public dialogue as to violate the First Amendment. The Court did so by rejecting the proposition that a group not similarly favored has a right to end a government subsidy to another group for lobbying purposes. In that regard, *Regan* stand on the strongest doctrinal footing. Any other conclusion would make unconstitutional the entire spectrum of governmental speech activity and of

CONCLUSION

For the above-stated reasons, the decision below should be reversed.

Respectfully submitted,

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governmental support for communications by private individuals. As the Court observed in reaffirming *Regan* in *Rust v. Sullivan*, 500 U.S. 173, 194 (1991), "[w]ithin far broader limits than petitioners are willing to concede, when the government appropriates public funds to establish a program it is entitled to define the limits of that program." The marketplace distortion argument is particularly suspect where, as here, the purpose and effect of governmental action is "not to abridge, restrict or censor speech but rather . . . to facilitate an enlarged public discussion" and therefore to "further[], not abridge[], pertinent First Amendment values." *Buckley v. Valeo*, 424 U.S. at 92; *see also Storer v. Brown*, 415 U.S. 724 (1974). In short, as this Court has held, the Establishment Clause of the First Amendment pertains only to religion, and not to speech generally. *Buckley v. Valeo*, 421 U.S. at 92.